
(2010) 12 KL CK 0135
In the High Court Of Kerala
Case No : W.A. No. 1399 of 2010

Dr. Saurabh Jain and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 15, 15(1), 19(1)(e), 21

Citation : (2011) 1 KLT 888

Hon'ble Judges : J. Chelameswar, C.J.; Thomas P. Joseph, J; P.R. Ramachandra Menon, J

Bench : Full Bench

Advocate : Kurian George Kannanthanam, M. Shaju Purushothaman and K.S. Rajesh, for the Appellant; V. Chitambaresh (Sr.), M. Sreekumar, P. Ravindran (Sr.), K. Gopal Krishna Kurup (Sr.), K.R.B. Kaimal and Alexander Thomas, for the Respondent

Judgement

J. Chelameswar, C.J.—These two writ appeals are listed before this Bench pursuant to an order of reference dated 4th November, 2010. The appellants in W.A. No. 1399 of 2010 are petitioners 1 to 3 in W.P.(C) No. 21357 and the appellants in W.A. No. 1429 of 2010 are the petitioners in W.P.(C) No 21494 of 2010. Both the writ petitions along with certain other writ petitions were dismissed by a common judgment dated 5th August, 2010. Hence this writ appeals. The brief facts leading to the present reference are as follows: The above mentioned two writ petitions and a number of other writ petitions came to be filed in this Court challenging the decision of the State of Kerala to create a preference in the matter of admission to the super speciality courses conducted by the medical colleges run by the State of Kerala. The relevant portion of the Prospectus issued for the purpose reads as follows:

III. Eligibility for admission:

xxxx

(iii) Has done atleast one year compulsory rural service/Senior residency/

Government service in any of the Government Medical colleges/Government Hospitals in Kerala.

(iv) In case sufficient number of candidates fulfilling the conditions as per (iii) above is not available, candidates who are otherwise qualified will also be considered, based on the merit in the entrance test.

(v) Preference shall be given to the candidates, who had done MBBS or MD/MS from the Medical Colleges in Kerala, for preparation of rank list. In case, sufficient number of candidates in the above category is not available for admission for any reason, candidates from other states will be considered for the balance seats, based on the merit in the entrance test.

2. The appellant participated in the selection process undertaken by the State of Kerala, but could not secure admission to any one of the super speciality courses. Their grievance is that candidates who are found less meritorious than them in the selection process eventually secured admission into the various super speciality courses in view of the preference created by the State of Kerala referred to earlier. Therefore they approached this Court challenging the stipulation of such a preference on various grounds such as (1) violation of the fundamental rights guaranteed Articles 14 and 15 of the Constitution of India (2) violation of the Regulations made by the Medical Council of India and (3) that the State is incompetent to make such a stipulation.

3. Whether the abovementioned grounds of challenge are tenable or not is not a matter to be considered by us, nor are they considered by the judgment under appeal. The writ petitions were dismissed on the ground that the appellants are stopped participated in the selection process undertaken by the State of Kerala knowing fully well about the existence from raising the various question in view of the fact they of the rule of preference. In coming too such conclusion reliance was placed upon a judgment of the Supreme Court reported in *Dhananjay Malik and Others Vs. State of Uttaranchal and Others*, and *K.H. Siraj Vs. High Court of Kerala and Others*, . The learned Judge also placed reliance on an earlier decision of this Court reported in *Ajith George Vs. State of Kerala*, .

4. By the referral order it was pointed out that the impugned rule of preference is prima facie violative of Articles 14 and 15 of the Constitution of India and therefore it is doubtful whether the appellants could be non-suited on the ground of estoppel. It is also recorded in the referral order that the decision of the learned Single Judge is sought to be supported by the respondents herein on the basis of a decision of the Division Bench of this Court reported in *Vipin I.S. Vs. State of Kerala and Others*, and therefore necessarily the correctness of the above decision also falls for consideration of this Bench.

5. In *Vipin v. State of Kerala*, the dispute was with regard to the admission to a super speciality postgraduate course named M.Ch. in Gastroenterology Surgery. There was only one seat available in the relevant year which was reserved in favour of candidates in the service of the State of Kerala. Such a reservation was

supported by an enactment of Kerala known as the Medical Officers' Admission to Postgraduate Courses under Service Quota Act, 2008. The prospectus issued in the context of the selection to the candidates for the relevant year specifically mentioned that the only seat in M.Ch. in Gastroenterology Surgery is earmarked for the candidates in the service of the State of Kerala. The petitioner applied for admission as there was a possibility of a candidate not in the service of the State of Kerala securing admission to such a seat in the event of non availability of a suitable candidate who is in the service of the State of Kerala. However, the petitioner lost out to a candidate who was in the service of the State of Kerala by virtue of the above mentioned rule of preference. It is in the said factual background a Division Bench of this Court held at paragraph 6 of the judgment as follows:

6. In the above backdrop, we notice that the petitioner is an open market candidate. He could have applied, and had in fact applied, only on the basis of the prospectus which is Ext. P4. It has been repeatedly laid down that it is the prospectus which controls the admission and it is the Magna Carta as far as the applicant is concerned. In the case in hand, the uncontroverted situation is that Ext. P4 prospectus was issued on 05.05.2010 while this writ petition is presented on 06.07.2010. The petitioner had applied for being considered as an open market candidate. If Ext. P4 prospectus stands, he could not have applied, if he was applying for M.Ch. in Gastroenterology Surgery. This is because the prospectus itself had categorically disclosed the fact that the only one seat available for M.Ch. in Gastroenterology Surgery was earmarked for in-service candidates. The petitioner, not having challenged the prospectus at that stage, but having participated and waited to know his prospects in the selection process, we are of the view that he is estopped from challenging the provisions in the prospectus made based on the Government decision to earmark one seat for M.Ch. in Gastroenterology Surgery, based on the recommendation of the appropriate committee. The learned senior counsel for the petitioner argued in this context that the eligibility of the petitioner to make a claim as against the seat for M.Ch. in Gastroenterology Surgery stems only because he had obtained the first rank as the open market candidate and could, therefore, make the first choice. He accordingly tried to justify the participation in the selection on the basis of the prospectus and the failure of the petitioner to challenge the prospectus, or the Government decision in that regard, earlier. We are not impressed with that. As already noted, the petitioner did not have even a right to apply for being considered for the seat of the M.Ch. in Gastroenterology Surgery, with the prospectus as it stands.

6. Before we examine the correctness of the said decision we deem it appropriate to examine the legal position in this regard.

7. "Estoppel" is an expression which "has been exclusively employed in the English Jurisprudence which has assigned to it a special and technical connotation". The seminal work of Spencer Bower and Turner on "estoppel by

representation" defines "estoppel by representation" as follows:

where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

In AIR 1935 79 (Privy Council) , J.C., Lord Russell of Killowen defines estoppel at p.151 as being "a rule of evidence which comes into operation if (a) a statement of the existence of a fact has been made by the defendant or an authorised agent of his to the plaintiff or someone on his behalf (b) with the intention that the plaintiff should act upon the faith of the statement, and (c) the plaintiff does act upon the faith of the statement."

8. Waiver of a right also is an aspect of estoppel falling under the head of "election". An extensive body of law dealing with the various aspects of estoppel by representation exists which was very elaborately discussed in the above mentioned book with masterly scholarship. It may not be either necessary or possible to go into the details of the various aspects of estoppel by representation mentioned above. Coming to the question of waiver of the rights created by the statutes, the learned author dealt with the same at page 142 of the third edition as follows:

Where a statute requires something to be done by one of the parties to an instrument or transaction as a condition of its validity, which, therefore, is not made by the statute absolutely illegal and void in itself, but only contingently so, it may be contended with considerable force that there is no reason why the party entitled to insist on a fulfillment of the statutory condition should not be allowed to waive his right, either by express agreement or consent, or by acts or conduct having the effect of precluding him from asserting the illegality of the instrument or transaction- an effect which can be nothing less than a form of estoppel. The soundness of this contention in any particular case, whether of express contract or of estoppel (for the principles which govern the former obviously govern the latter also), depends upon the question whether the right which is abnegated is the right of the party alone, or of the public also, in the sense that the general welfare of the community, or the interests of the class of persons whom it is the object of the law to protect, cannot be secured in the manner intended without prohibiting the waiver or estoppel.

9. In the context of the enforcement of fundamental rights guaranteed by the Constitution or adjudication of the obligations and duties owed by the State to its

subjects arising out of the Constitution whether the doctrine of waiver is applicable or not is a question which fell for consideration of the Supreme Court on more than one occasion. In *Bheshwar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, the Supreme Court was dealing with the question whether a person can waive a right flowing from Article 14 of the Constitution. At paragraph 14 Das, C.J. speaking for himself and Kapoor, J held:

14. Such being the true intent and effect of Art. 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it." I do not think the state will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear", on the language of Art. 14 that it is a command issued by the Constitution to the State a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

10. The Constitution Bench specifically confined the enquiry to the possibility of the waiver of a right conferred under Article 14 of the Constitution. At paragraph 12 of the said judgment the court recorded as follows:

12. The fundamental right, the breach whereof is complained of by, the assessee, is founded on Art. 14 of the Constitution. The problem, therefore, before us is whether a breach of the fundamental right flowing from Art. 14 can be waived. For disposing of this appeal it is not necessary, for us to consider whether any of the other fundamental rights enshrined in Part III of our Constitution can or cannot be waived. We take the view that this Court should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case before it. We, therefore, confine our attention to Art. 14 and proceed to discuss the question on that footing.

11. In coming to such a conclusion the Supreme Court also took note of certain observations made by it earlier in *Behram Khurshed Pesikaka Vs. The State of Bombay*, and made an express declaration that the right under Article 14 cannot

be waived. The Supreme Court also (at paragraph 16) noticed certain other earlier decisions of the Supreme Court relied upon by the State in support of the argument that the fundamental right under Article 14 could be waived and held that "...in none of those cases the question of waiver was specifically or seriously discussed".

12. Again in *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, a Constitution Bench of the Supreme Court considered the question of estoppel and waiver in the contest of the fundamental rights. Paragraphs 29 and 30 of the said judgment read as follows:

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In *Basheshar Nath v. CIT*, a Constitution Bench of this Court considered the question whether the fundamental rights conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14. but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

30. We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioners' contentions on merits.

It can be seen from the above extract that the Supreme Court took note of the fact that the two judges of the court in deciding *Basheshar Nath*'s case (supra) opined that the right under Article 14 could not be waived, another two judges held that not only the fundamental right under Article 14, but any other fundamental right guaranteed under Part III of the Constitution could also not be waived.

13. In *Olga Tellis* case the Supreme Court was considering the fundamental rights [under Articles 21 and 19(1)(e)] of the pavement/slum dwellers. In the process, it had to examine a preliminary objection raised by the respondents therein that the pavement dwellers are "estopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them" in view of an undertaking given on their behalf before the Bombay High Court on an earlier occasion. The Supreme Court rejected the preliminary objection holding that:

It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution.

14. Therefore, we are of the opinion that estoppel is not a defence available to the State when its action is challenged on the ground of violation of any fundamental right or the provisions of the Constitution.

15. However, a plethora of judgments are cited before us by the respondents in support of their submission that the defence of estoppel is still available to the State notwithstanding the grievance of the appellants that their fundamental rights are at stake. We shall now examine those decisions. Before we examine the various decisions relied upon by the respondents before us, we deem it appropriate to examine the two decisions of the Supreme Court relied upon by the learned Judge in the judgment under appeal. In *Dhananjay Malik and Others Vs. State of Uttaranchal and Others*, a Division Bench of the Supreme Court was considering the case of a selection to the posts of Physical Education Teachers of the State of Uttaranchal. The advertisement inviting applications from (he candidates specified a particular qualification. The unsuccessful candidates challenged the legality of the selection process on the ground that the qualification specified in the advertisement was contrary to the relevant rules. The challenge was accepted by the High Court and in appeal, the Supreme Court repelled the challenge on the ground that the unsuccessful candidates who had participated in the selection process are "estopped and precluded from questioning the selection process". We must state that it is not clear from the above decision whether the unsuccessful candidates failed to secure the employment because that they did not have the qualification notified in the advertisement or that inspite of their having such qualifications they were found less meritorious than the other candidates. In our opinion, that is a very crucial factor for deciding the rights of such candidates. If such candidates had the qualifications notified in the advertisement and participated knowing fully well that such a stipulation was contrary to the relevant rules applicable to the service, and failed in the selection process the candidates cannot be said to have suffered any prejudice by the said stipulation. As eventually their failure is not attributable to the lack of "the notified qualification". It appears to us from the limited facts stated in the judgment that the petitioners participated in the selection process which is possible only if they also possessed the notified qualification.

16. However, in reaching the conclusion that such candidates are estopped from challenging the selection process, the Supreme Court relied upon two earlier decisions of the Supreme Court reported in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, and *Marripati Nagaraja and Others Vs. The Government of Andhra Pradesh and Others*, . At the outset it must be mentioned that both the above mentioned judgments are by the Division Benches of the Supreme Court of two Judges each.

17. In *Madan Lal's* case the Supreme Court was dealing with the legality of the selection process in the recruitment of Munsiffs in the State of Jammu and Kashmir undertaken by the Public Service Commission of the state. The said

selection process came to be challenged on various grounds. One of the grounds was that members of the Board who conducted the viva voce test did not maintain any separate record of the marks assigned to each one of the candidates while assessing the performance of such candidates which is a requirement under Rule 10 of the relevant rules.

The impugned viva voce test conducted by Respondent 2, Commission is patently illegal as there is nothing to show that the Members who conducted the test had assigned separate marks faculty wise for assessing the performance of the candidates concerned as per Rule 10 of the Rules

Dealing with the said contention the Supreme Court at paragraphs 9 and 10 of the judgment made certain observations.

9. ...It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted....

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful....

At paragraph 13 of the judgment their Lordships recorded a categorical finding that there was no obligation under the relevant rules cast upon the members of the interviewing panel to maintain separate records, in the

13. It is not possible to agree with this contention. So far as Rule 10(1)(b) is concerned it does not provide for any separate assessment of marks for candidates at viva voce examination faculty wise, that is on intelligence, general knowledge, etc., listed in the said rule. On the contrary, it appears that as per the said rule, while conducting viva voce examination the Committee has to keep in view the main object of assessing such candidates in the light of the guidelines given therein. In other words, the Interviewing Committee has to keep in view the overall performance of the candidates at the oral interview and while doing so their intelligence, general knowledge, personality, aptitude and suitability have to be kept in the centre. The rule merely lays down the object of assessing such candidates in the viva voce examination. It is a general guideline given to the Interviewing Committee members. Therefore, it is not possible to agree with the submission of the Senior Counsel for petitioners that the members of the Interview Committee must separately assess and give marks on different listed topics faculty wise as per the said rule.

The observations regarding the participation of the writ petitioners in the selection process in our view do not constitute the ratio of the judgment. In view of the above extracted finding that Rule 10 does not require the members of the interview committee to maintain separate assessment records the observations

regarding estoppel extracted earlier are not necessary to decide the issue. At any rate, there was no specific challenge or a consideration of the issue recorded in the judgment whether the selection process is vitiated because of the violation of any fundamental right of the writ petitioners.

18. Coming to Marripati Nagaraja's case, it was a case where the selection process undertaken for filling up of various posts in the State of Andhra Pradesh by the Public Service Commission was challenged on various grounds. One of the grounds was that a very limited time had been granted to the candidates for appearing in the screening test and therefore it was an arbitrary exercise undertaken by the State. Dealing with the said submission at paragraph 19 of the said judgment the Court held as follows:

19. The other contention of Mr. Rao that the candidates had been given only seven days' time for making preparation to appear in the second screening test, cannot, in our considered view, give rise to a ground for setting aside the entire selection process. The Tribunal did not make any discrimination. One screening test had already been held. The number of candidates appeared in the first screening test was 510. The Commission obtained the permission of the Tribunal for holding the second screening test. It issued a notification on 12.12.2000 stating that such a test would be conducted on 07.01.2001. All the candidates were given the same time for preparation. Only because the appellants herein were employees at the relevant time, the same by itself could not confer on them any special privilege to ask for an extended time. They had no legal right in relation thereto. Appellants had appeared at the examination without any demur. They did not question the validity of the said question of fixing of the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.

19. In other words, the Court held that the limited amount of time available was uniform to all the candidates who applied for the post and the appellants cannot complain against the limited period of time given on the ground that the appellants were already employed elsewhere and therefore by virtue of the pressure of work arising out of such employment they require a larger time than given to the other unemployed candidates. The Supreme Court categorically held that they had no legal right to make such a claim. In the process, an observation was made that the appellants did not question the validity of the fixing of the said date before the appropriate authority and therefore they are estopped and precluded from questioning the selection process. With utmost respect we must state that such a statement is neither really necessary for the decision nor is based on any definite consideration of any legal principle discussed in the judgment. On the other hand, it is also not a case where the Supreme Court was considering the infringement of any fundamental right in the context of the selection process which was in challenge. In our opinion, neither of the above two decisions lays down any absolute proposition that candidates participating in a selection process either for employment or for an educational opportunity are

either estopped from challenging the legality of the process only on the ground that they participated in the selection process before raising the challenge to the selection process.

20. The next decision relied upon by the respondents reported in *K.H. Siraj Vs. High Court of Kerala and Others*, is once again a decision by the Division Bench of the Supreme Court. It was a case where the challenge was to the selection process undertaken by this Court for filling up of certain posts of Munsiff-Magistrates in the State of Kerala. The select list was challenged on the ground that it is not consistent with the relevant rules which provided for reservation of certain posts in favour of certain classes of persons. One of the questions before the Supreme Court was the legality of the procedure followed by the High Court in insisting upon a minimum mark to be secured in the oral examination which was not authorized by Rule 7 of the Kerala Judicial Service Rules, 1991. Dealing with the said submission at paragraphs 59,60 and 61 of the said decision the Supreme Court held as follows:

59. The appellants/petitioners, in any event, are not entitled to any relief under Art. 226 of the Constitution of India for more reasons than one. They had participated in the written test and in the oral test without raising any objection. They knew well from the High Court's Notification that a minimum marks had to be secured both at the written test and in the oral test. They were also aware of the High Court decision on the judicial side reported in *S. Remany Vs. High Court of Kerala and Others*, . This case deals with prescription of minimum qualifying marks of 30% for viva voce test. C.S. Rajan, J., in the above judgment, observed as under:

On the basis of the aggregate marks in both the tests, the selection has to be made. In *P.K. Ramachandra Iyer and Others Vs. Union of India (UOI) and Others*, also the relevant rules did not enable the Selection Board to prescribe minimum qualifying marks to be obtained by the candidate at the viva voce test. In the *Umesh Chandra Shukla Vs. Union of India (UOI) and Others*, , the rules did not empower the committee to exclude candidates securing less than 600 marks in the aggregate. Therefore, in all these cases, the Supreme Court came to the conclusion that prescription of separate minimum marks for viva voce test is bad in law because under the rules, no minimum qualifying marks were prescribed.

60. The High Court also relied on *P.K. Ramachandra Iyer's* case (supra) and *Umesh Chandra's* case (supra). The appellants/petitioners having participated in the interview in this background, it is not open to the appellants/petitioners to turn round thereafter when they failed at the interview and contend that the provision of a minimum mark for the interview was not proper. It was so held by this Court in paragraph 9 of *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, as under:

Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents

concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, , it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner.

61. Therefore, the Writ Petition filed by the appellants/petitioners should be dismissed on the ground of estoppel is correct in view of the above ruling of this Court. The decision of the High Court holding to the contrary is in per curiam without reference to the aforesaid decisions.

21. The prescription of the minimum qualifying marks was there even by the date of the notification inviting applications for the selection. The authority of the High Court to make such a prescription is not doubted in the above decision. In the circumstances, the further enquiry whether the candidates who had participated in the selection knowing fully well that there was such a prescription which was not authorized by the relevant rules, are estopped from challenging the selection process, in our opinion, was not really necessary for the decision. Because the Supreme Court reached a positive conclusion that Rule 7 of the Kerala Judicial Service Rules, 1991 did authorize the High Court to make such a prescription. In the circumstances it would be irrelevant whether the petitioners challenged the prescription by approaching the Court before participating in the selection process or after their selection process. That rule 7 referred to above did authorize the High Court to prescribe such a minimum qualifying marks is found by the Supreme Court in paragraphs 39 and 40 of the judgment in the following words:

39. ...Since the High Court is the best Judge of what should be the proper mode of selection, R.7 has left it to the High Court to follow such procedure as it deems fit. The High Court has to exercise its powers in the light of the constitutional scheme so that the best available talent, suitable for manning the judiciary may get selected. 40. What the High Court has done by the Notification dated 26.03.2001 is to evolve a procedure to choose the best available talent. It cannot

for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved.

The question of waiver of a fundamental right did not arise for consideration of the Court in the above mentioned case. Nor any other known principle of estoppel is applicable to the situation.

22. The next case relied upon by the learned counsel is reported in *Cochin University of Science and Technology and Another Vs. Thomas P. John and Others*, . It was a case where some of the students pursuing B.Tech. course in the appellant University who secured admission against the seats reserved for non-resident Indian category complained against the collection of a higher fee compared to the fee paid by the students admitted against the same quota but in the subsequent academic years and argued that such a practice amounts to discrimination and therefore violative of Article 14 of the Constitution. Before the High Court one of the submissions made by the University was that the petitioners were estopped from raising such a contention as they secured admission knowing fully well the relevant terms and conditions on which admission would be granted by the University for the year of their admission. The High Court rejected the defence of the University on the ground that the fundamental right of the petitioners under Article 14 was violated and therefore the plea of estoppel was not available to the University. Reversing the decision of the High Court the Supreme Court at paragraph 19 of the said decision held as follows:

We do not agree with this submission for several reasons, firstly, the NRI students have not been granted admission on their overall merit but on the basis of the 10% reservation in their favour and as such any claim based on equity would be suspect, and secondly, each set of admissions made year-wise cannot be said to overlap the admissions made earlier or later.

In substance, in our opinion, the Supreme Court opined that the petitioners could not successfully plead violation of Article 14 as students admitted in different academic years by the University do not form a uniform class. Therefore, that decision, in our view does not in any way assist the respondents as to the availability of the plea of waiver or estoppel in the context of the infringement of the fundamental rights as it was found by the Supreme Court that there is no violation of the fundamental rights of the petitioners.

23. Sri. T. B. Hood, learned senior Government Pleader appearing for the State brought to our notice a decision of the Supreme Court reported in *Nain Sukh Das and Another Vs. The State of Uttar Pradesh and Others*, . It was a decision by a Constitution Bench of the Supreme Court. The challenge before the Court under Article 32 was to the by-elections to a particular Municipality. The petitioners questioned the legality of the election which was held on the basis of separate electorates on communal lines on the ground that the creation of such

electorates is contrary to Articles 14 and 15 of the Constitution. The petitioners allege that they were deprived of their electoral rights (1) to vote and (2) to participate as candidates in the election by virtue of the creation of such electorates on communal lines. The Supreme Court declined to exercise jurisdiction under Article 32 of the Constitution of India on the ground that the remedy under Article 32 is a discretionary remedy and the conduct of the petitioners did not justify the exercise of the discretion for two reasons. According to the Supreme Court, the petitioners moved the Court only after a successful no confidence motion against the Chairman of the Municipality, but not either during the election process or immediately thereafter. In this regard, the Supreme Court at paragraph 7 of the judgment held as follows:

There is no suggestion that the petitioners actually sought to assert those rights by taking appropriate proceedings to have the bar removed and the election conducted in accordance with the Constitution. In fact, the petitioners acquiesced in the elections being conducted under the old system of separate electorates and felt no discrimination having been practised against them until a no confidence motion was tabled recently against the former Chairman who has since lost his seat as a result of that motion having been carried thus, the infringement of their fundamental rights under Art. 15(1) and Art. 14, that is, the discrimination practised against them, of which they now complain, related to rights which they infact never sought to exercise and took no steps to assert, while there was still room for doing so, and for the exercise of which the opportunity is now lost.

In our opinion, there is a distinction between non-suiting of a petitioner approaching the legal forum on the ground of either waiver of a legal right or estoppel by conduct and declining to interfere in the matter where the jurisdiction is discretionary on some well recognized principle governing such exercise of discretionary jurisdiction. In our opinion the abovementioned decision is not an authority for the proposition that even in the case of violation of the fundamental right the petitioners could be non-suited on the ground of either estoppel or waiver, but it is an authority for the proposition that the bona fides of the petitioners are a relevant factor in deciding the question whether the court should exercise its discretionary jurisdiction.

24. Sri. P. Ravindran, learned senior counsel appearing for some of the respondents argued that the writ petitions from out of which the present writ appeals arise are barred by laches as the petitioners waited for two full months after the notification inviting applications on 6.5.2010. Under the said notification the last date for submission of applications was 24.5.2010. The entrance examination was conducted on 12th and 13th of June, 2010. The results of the examination were published on 29.6.2010 and the writ petitions were filed on 8.7.2010. In support of the said submission the learned counsel relied upon the decisions reported in Durga Prasad Vs. Chief Controller of Imports and Exports, and Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, .

We are of the opinion that the submission is beyond the scope of the reference and therefore we decline to consider the same.

25. The learned counsel also submitted that the appellants are estopped from challenging the selection process in view of their participation in the said process and relied upon a judgment reported in *Union of India (UOI) and Others Vs. S. Vinodh Kumar and Others*, . It was a case where the Supreme Court was dealing with a dispute regarding the recruitment to the posts of Gangman by the South-Eastern Railways. The employer stipulated certain cut off marks with reference to the various categories of candidates such as general and reserved categories. Different cut off marks have been prescribed for different categories. Posts reserved in favour of Scheduled Castes and Scheduled Tribes could not be filled up pursuant to the selection process on the ground of non-availability of qualified eligible candidates. The unsuccessful candidates approached the Central Administrative Tribunal seeking a direction that the Railway be directed to reduce the minimum qualifying marks with reference to the above mentioned categories of candidates. Eventually the matter reached the Supreme Court. The Supreme Court at paragraph 10* It may be true that the cut-off marks at 71 had been fixed for unreserved candidates on the basis that marks obtained by the last candidate, i.e. 240th candidate, calculated at 50% of the 480 candidates, but concededly 56 marks were fixed for Other Backward Classes candidates and 20 marks were fixed for Scheduled Caste and Scheduled Tribe candidates. Only because the cut-off marks at 71 had been fixed on the basis of the aforementioned criteria, the same by itself, in our opinion, would not mean that no cut-off mark had been fixed. The fact that the Railway Administration intended to fix the cut-off mark for the purpose of filling up the vacancies in respect of the general category as also reserved category candidates is evident from the fact that different cut-off marks were fixed for different categories of candidates. We are, therefore, unable to accept the submission of the learned counsel that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor disputed. If the cut-off mark was fixed on a rational basis, no exception thereto can be taken. of the judgment opined that the cut-off marks fixed by the employer were neither arbitrary nor in any way violative of Articles 14 and 15 of the Constitution of India.

The Court opined that the employer had the power to fix cut off marks subject to the limitation that such fixation is made on a rational basis. Therefore it should logically follow that that the writ petitioners do not have any legal right to seek the remedy such as the one sought by them and the writ petitions must fail on that ground. However, at paragraph 18 of the said judgment the Supreme Court held as follows:

18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not

entitled to question the same.

That observation in our opinion was neither really necessary in the background of the above mentioned facts nor was it made in the context of an established violation of the fundamental rights of the parties seeking relief from the court.

26. Sri. K. Gopalakrishna Kurup, learned senior counsel relied upon a decision reported in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, and laid emphasis on paragraph 23 of the said judgment in support of his submission that the jurisdiction under Article 226 is discretionary and the petitioners in the instant cases who have waited for two long months are not entitled to any relief from this Court. The learned counsel argued that because of the delayed approach of the writ petitioners to this Court third party interest had set in such as interests of the respondents represented by Sri. K. Gopalakrishna Kurup who are the candidates selected pursuant to the selection process in dispute. We do not wish to examine the submission as the same is beyond the scope of the reference.

27. Sri. V. Chitambaresh, learned senior counsel appearing for some of the contesting respondents argued that the appellants who are seeking admission to the super speciality postgraduate medical course have no fundamental right to such a higher education in view of the judgments of the Supreme Court reported in *Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc.*, *etc.*, *State of Bihar and Others Vs. Project Uchcha Vidya, Sikshak Sangh and Others*, and *Ashoka Kumar Thakur Vs. Union of India (UOI) and Others*, and We do not propose to go into the submission for the reason that the reference is not on the ground whether there was any violation of the fundamental rights of the appellants guaranteed either under Article 21 or 21A of the Constitution of India but on the ground that they complained of violation of the fundamental rights guaranteed under Articles 14 and 15 of the Constitution.

28. We may also point out here that the various cases relied upon by the respondents in support of their submission of either waiver or estoppel are cases where the candidates approaching the Supreme Court were unsuccessful in the selection process in the sense that they did not qualify under the existing norms, whereas in the instant appeals the appellants are admittedly qualified in the sense that but for the priority based on the territorial nexus created by the respondents the appellants would have been selected as they are found to be of a higher merit.

29. That leaves us with the other question regarding the correctness of the decision reported in *Vipin I.S. Vs. State of Kerala and Others*, . We have already extracted paragraph 6 of the said judgment earlier. It was a case where the only seat available in a particular discipline of super speciality postgraduate medical course was reserved in favour of a candidate in the service of the State of Kerala. Such a reservation is authorised by an enactment of the State of Kerala. Dealing with the challenge the learned Judges opined that the writ petitioner could have

applied only on the basis of the prospectus. We are unable to accept the same. In our opinion, the right to seek an educational opportunity in an institution run by the State does not depend upon the prospectus issued by the institution. Every citizen of this country is entitled to be considered and compete for the said opportunity unless such a right is restricted by an otherwise constitutionally permissible law. The Kerala Medical Officers Admission to Postgraduate Courses under Service Quota Act, 2008 does not exclude or create a restriction on the rights of persons other than the medical officers in the service of the State of Kerala from seeking admission into such postgraduate course. It only embodies a rule of preference in favour of the medical officers in the service of the State of Kerala and in a given case if no qualified medical officer in the service of the State of Kerala is either available or does not opt for a particular educational opportunity, the Act still permits the opportunity to be given to others. Therefore, in our opinion, the learned Judges fell in error in coming to such a conclusion that the rights of the petitioners depend on the prospectus which consequentially led to another error that the petitioners before them (without challenging the prospectus) having participated in the selection process are estopped from challenging the provisions of the prospectus at a later point of time. Apart from that the learned Judges did not specifically consider the applicability of the doctrine of estoppel in the context of the violation of a fundamental right. We therefore are of the opinion that the above mentioned judgment does not lay down the correct position of law and we declare it as such. We make it clear that we have not examined the correctness of the said decision in its entirety. For all the above mentioned reasons we are of the opinion that the judgment under appeal cannot be sustained and the same is accordingly set aside. The matter is required to be remitted for consideration of the case of the appellants in accordance with law. In the normal course those cases are required to be remitted to the learned Single Judge. But in view of the fact that various other writ petitions in which similar questions were raised have already been considered and disposed by the learned Single Judge allowing the writ petitions and aggrieved by the same writ appeals are filed and pending before a Division Bench of this Court, we are of the opinion that these matters also be remitted to the Division Bench for hearing along with W.A. No 1632 of 2010 and connected cases.

The reference is answered accordingly.

* It may be true that the cut-off marks at 71 had been fixed for unreserved candidates on the basis that marks obtained by the last candidate, i.e. 240th candidate, calculated at 50% of the 480 candidates, but concededly 56 marks were fixed for Other Backward Classes candidates and 20 marks were fixed for Scheduled Caste and Scheduled Tribe candidates. Only because the cut-off marks at 71 had been fixed on the basis of the aforementioned criteria, the same by itself, in our opinion, would not mean that no cut-off mark had been fixed. The fact that the Railway Administration intended to fix the cut-off mark for the purpose of filling up the vacancies in respect of the general category as also

reserved category candidates is evident from the fact that different cut-off marks were fixed for different categories of candidates. We are, therefore, unable to accept the submission of the learned counsel that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor disputed. If the cut-off mark was fixed on a rational basis, no exception thereto can be taken.